Supreme Court, U.S.
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No. 92 - 240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT ALLEN MOORE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

On Writ Of Certiorari
To The Supreme Court Of Texas

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
512/474-1563
FAX # 512/474-4727

Attorney for petitioner

Alpha Law Brief Co.* 6113 Aletha Lane* Houston, Texas 77081 (713)981-9000

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The State Bar make a number of statements of fact which are incorrect or which were sharply contradicted during the trial. Moore did not ask Taylor to help him secure a $100,000.00 loan, and did not suggest that Taylor approach his aunts for such a loan. S.F. Vol. II, pp. 55-57. Moore began searching for another bank to finance his practice before the Metro Bank closed, and the loan at the Texas American Bank had been arranged and approved

before Moore met with Taylor's aunts. *Id.*, pp. 62-64, 66-68. Mr Moore made no representation to the Taylor aunts that he might have to withdraw from Taylor's case unless financing was secured. S.F. Vol. III, p. 239. The list of cases was not prepared by Moore or at his request, *Id.*, pp. 62-64, 66-68, nor did he ever assure the Taylor aunts that the cases on the list were guaranteed to produce substantial amounts of money or represent that each case had a certain settlement value; and he did not assure them that a professional corporation could not file for bankruptcy. S.F. Vol. II, pp. 66-69; S.F. Vol. III, pp. 120, 209-210; S.F. Vol. IV, pp. 444, 450.

The State Bar also distorts the sequence of events leading to default in payment of the loan. Mr. Moore repaid the original $100,000.00 note. However, the Texas American Bank refused to substitute Moore's collateral and release the aunts' certificates of deposit as security for the remaining loan, S.F. Vol. III, p. 225, contrary to previous representations by banker Porterfield to the aunts and to Moore. *Id.*, p. 226. Mark Taylor's aunt, Mary Taylor, wanted to, and in fact did, sue Texas American Bank because it refused to honor its agreement to let Mr. Moore substitute his collateral as security and release the Taylor aunts' C.D.'s *Id.*, pp. 225-226. However, despite these problems, payments on the loan were current when the balance was accelerated. Mr. Moore was forced into a Chapter 11 bankruptcy proceeding as a result of actions by Mark Taylor, which are described in the Petition for Writ of Certiorari.

JURISDICTION

The State Bar contends that the Petition for Writ of Certiorari should be denied because jurisdiction has not been established in accordance with either Rule 10.1(a) or 10.1(b) of the Rules of the Supreme Court of the United States. It

is argued that since no federal question was decided by the state court of last resort, and Moore asserted due process arguments for the first time in his motion for rehearing of the application for writ of error, jurisdiction does not exist. The argument is contrary to the controlling authorities.

The Texas Supreme Court's denial of the motion for rehearing of the application for writ of error constituted a rejection of Moore's due process arguments. Thus, the court of last resort in Texas decided a federal question in a way that conflicts with decisions of one or more United States Courts of Appeals and with applicable decisions of this Court. Therefore, jurisdiction is proper under Rule 10.1(b) and (c).

The fact that the due process question was raised for the first time in the Texas Supreme Court does not defeat jurisdiction. In *Hildwin v. Florida*, 109 S. Ct. 2055, 2056 (1989) the Florida Supreme Court rejected, without discussion, the argument that the Florida capital sentencing scheme violated the Sixth Amendment, which was raised for the first time in the appeal. Nevertheless, the Supreme Court held that it had jurisdiction to decide the merits of the claim. The Court reached the same result in *Staylor v. Illinois*, 108 S. Ct. 646, 651, n. 9 (1988), in which the constitutional claim was not raised until the petition for rehearing in the Illinois Appellate Court; *Hathorn v. Lovorn*, 457 U.S. 255, 262-265, 102 S. Ct. 2421, 2426-2428, 72 L. Ed. 2d 824 (1982), in which the constitutional claims were raised, but not passed upon, in the Mississippi Supreme Court on petition for rehearing; *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), which quoted *Dury v. Des Moines*, 173 U.S. 193, 197-198, 19 S. Ct. 379, 380-381, 43 L. Ed. 665 (1899) to the effect that "[i]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in

substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment" the court has jurisdiction; and *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889 (1981), which held that the court has jurisdiction if the record shows expressly or by clear implication that the federal claim was adequately presented in the state system, i.e., if a state court was timely apprised of the nature and substance of the federal claim.

In this case, there can be no doubt that petitioner's due process claim was squarely and adequately presented to the Texas Supreme Court in petitioner's motion for rehearing, that, prior to that time, the claim had been fully and clearly articulated in other assignments or error presented to the Texas Supreme Court in the Application For Writ of Certiorari, and that the Texas Supreme Court had adequate opportunity to address it. *See Appendix*. Accordingly, this Court has jurisdiction.

ARGUMENT AND AUTHORITIES

Contrary to the assertions of the State Bar, the Taylor affidavit clearly constituted "new charges" which were considered by the jury and addressed and comprehended by the sole question submitted to the jury, i.e., whether Moore had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. These new charges were introduced without granting Moore an opportunity to prepare or defend against them. Therefore, *In Re Ruffalo*, 390 U.S. 544, 88 S. Ct. 122, 20 L. Ed. 2d 177 (1968), which mandates that all charges must be known prior to commencement of trial, requires that this case be reversed.

The material contained in the Taylor affidavit was improperly admitted into evidence. It constituted an enlargement of the charges against Moore by the State Bar

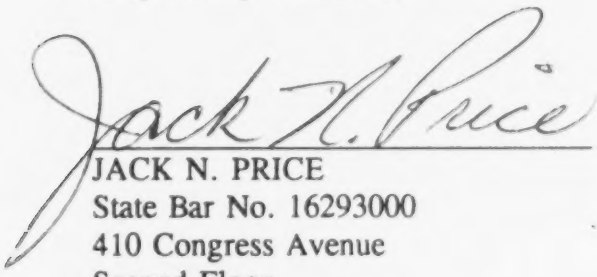
and a *de facto* amendment to its pleadings. The evidence submitted to the jury in the form of the affidavit included allegations of fraud, dishonesty, deceit, and misrepresentation not plead in the State Bar's petition for disbarment, and other scurrilous, unsubstantiated allegations against Moore. There was a considerable variance between the State Bar's pleadings and the evidence it was allowed to introduce, and on which the jury's verdict was based. The State Bar was not entitled to introduce the portions of the affidavit unrelated to the portion used for impeachment. The facts of this case are far different than those in the case of *In Matter of Peterson*, 439 N.W.2d 165 (Iowa 1989), on which the State Bar relies. Peterson was apprised of an affidavit against him prior to the hearing. Moore received no such notice and had no time to prepare to defend the irrelevant and highly prejudicial claims made in the Taylor affidavit.

The State Bar's contention that it had the right to argue that Moore defrauded the Taylor aunts by utilizing their credit to secure the loan then "walked away," while Moore was barred from testifying about repayments, is particularly specious. The argument obviously was damaging to Moore. Jurors' affidavits obtained after the trial attest to the fact that evidence of repayments would have materially affected their verdict. It is also obvious that the error in refusing to admit evidence of repayments by Moore on the issue of fraud, dishonesty, etc., could not be eliminated by allowing Moore to testify to the repayments during the sanctions hearing, as the State Bar suggests, even if he had been given such opportunity, which he was not.

SUMMARY AND CONCLUSION

For the reasons set out above, and in petitioner's petition for writ of certiorari, it is respectfully submitted that the petition for writ of certiorari should be granted, and the judgment below should be reversed and the cause remanded for retrial.

Respectfully submitted,



JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
(512) 474-1563
FAX (512) 474-4727

ATTORNEY FOR PETITIONER

APPENDIX

Official Notice From Supreme Court of Texas

RE: Case No. D-1965
Style: ROBERT ALLEN MOORE
v. THE STATE BAR OF TEXAS

OFFICIAL RECEIPT
STATE OF TEXAS
April 6, 1992
STATE PENALTY
FOR PRIVATE USE

Petitioner's motion for rehearing of application for writ of error in the above styled case was this day received and filed.

JOHN T. ADAMS, CLERK

NO. D-1965

IN THE SUPREME COURT OF TEXAS

ROBERT ALLEN MOORE,
Petitioner,

vs.

THE STATE BAR OF TEXAS,
Respondent.

ON APPEAL FROM THE FOURTH COURT
OF APPEALS
SAN ANTONIO, TEXAS

MOTION FOR REHEARING

JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
512/474-1563
FAX # 512/474-4727

ATTORNEY FOR PETITIONER

CERTIFICATE OF INTERESTED PARTIES

In order that the members of the court may determine disqualification or recusal pursuant to Tex. R. App. P. 131(a), petitioner certifies that the following is a complete list of the parties, their counsel, and all other persons known to have an interest in the outcome of this case:

1. Robert Allen Moore, the petitioner;
   307 North Grant
   Odessa, TX 79761

2. Jack N. Price, counsel for petitioner;
   410 Congress Avenue
   Austin, TX 78701

3. The State Bar of Texas, the respondent; and
   Office of the General Counsel
   P.O. Box 12478, Capitol Station
   Austin, TX 78711

4. Linda A. Acevedo, counsel for respondent.
   State Bar of Texas
   Office of General Counsel
   P. O. Box 12487, Capitol Station
   Austin, TX 78711

/s/ illegible
JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
512/474-1563
FAX # 512/474-4727
ATTORNEY FOR PETITIONER

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NO. D-1965

IN THE SUPREME COURT OF TEXAS

ROBERT ALLEN MOORE,
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vs.

THE STATE BAR OF TEXAS,
Respondent.

ON APPEAL FROM THE FOURTH COURT
OF APPEALS
SAN ANTONIO, TEXAS

MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, Robert Allen Moore, respectfully submits this Motion for Rehearing of denial of Application for Writ of Error.

Statement

Judgment of disbarment was entered against Moore based on a jury finding that he had engaged in "conduct involving dishonesty, fraud, deceit, or misrepresentation," on February 30, 1990, in Cause No. 17,508, 63rd Judicial District Court, Val Verde County, Texas, Judge Curt Steib, presiding. Tr. 407-11, 439-41. The State Bar's trial pleadings, i.e., its third amended disciplinary petition, S.F.

377-82, filed Jan. 19, 1990, alleged that in the spring of 1983, Moore asked his employee and client, Mark Taylor, to seek the assistance of Taylor's aunts in obtaining a line of credit for Moore, and that, at Moore's request, Taylor approached his aunts about utilizing their certificates of deposit as collateral for a loan of $100,000.00, and a second loan of $830,000.00. S.F. 377-78. The State Bar alleged that to secure the first loan, Moore represented to Taylor that if Moore was unable to secure the loan, he would have to withdraw from representing Taylor. Tr. 378. To secure the second loan, the State Bar alleged, Moore represented to Mary and Blanche J. Taylor:

(1) "that if the loan were not made, respondent would have to withdraw from representing [Mark] Taylor because of [Moore's] financial difficulties in continuing operation of his law firm and that said case would thereby be jeopardized;"

(2) "a settlement and/or a trial value of a number of respondent's personal injury cases;" and

(3) "that settlement funds sufficient to cover the payoff of the loan would be received prior to maturity of the loan."

Tr. 379.

The State Bar claimed that these representations were false and were made fraudulently for the purpose of inducing the Taylor aunts to pledge their C.D.'s as collateral for the loans, and that the Taylor aunts would not have done so had the misrepresentations not been made. Tr. 379-80. On the basis of these allegations, the State Bar claimed that Moore violated disciplinary rules 1-102(A) (1) (providing that a

lawyer shall not violate a disciplinary rule), (2) (providing that a lawyer shall not circumvent a disciplinary rule through actions of another), (4) (providing that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), and (6) (providing that a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law). The case was submitted to the jury on the single question of whether Moore engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, to which the jury answered "yes." However, this answer was heavily influenced by evidence of accusations against Moore contained in an affidavit by the State Bar's chief witness, Taylor, which were extraneous to the State Bar's pleadings and beyond the scope of the charge against Moore.

Despite the fact that the State Bar's petition gave notice only of the claim that Moore made misrepresentations to Mary and Blanche J. Taylor to induce them to pledge their C.D.'s for the loans to Moore, the court, at the instance of the State Bar, allowed the introduction, in its entirety, of the affidavit by Taylor which accused Moore of (1) "constant self-promotion," Tr. 579; (2) being in "extreme financial trouble," id.; (3) running through "the entire million [dollars borrowed] very quickly," Tr. 582; (4) refusing to try to settle Taylor's probate case "saying it could not afford it that tax year," id.; (5) engaging in business from his trust account. including paying personal bills, firm obligations, loans or "other activities," id.; (6) constantly paying off one client or group of clients late "and hoping more money would come in soon to pay the client or group of clients now far over due for their money," id.; (7) spending "in excess of 50% of his time juggling the accounts in trying to get money back into the trust account which had already been spent," id.; (8) participating in activities which were unethical, Tr. 583; (9) firing two secretaries, who appeared before the grievance committee regarding use of trust funds

and other matters, id.; (10) "constantly misrepresenting the value of pending cases," id.; (11) "making promises he did not keep," id.; (12) "alternating between despondent and threatening moods and demeanor and irrationality," id.; (13) "threatening to kill himself," id.; (14) threatening to see to it that lawsuits and proceeds disappeared in his Del Rio office "or across the border," id.; (15) constantly representing to Taylor's aunts, and Taylor, "the he [could not] avoid [the] debt legally, in any way, and that a professional corporation cannot file bankruptcy," id.; and (16) making other misrepresentations "too numerous to mention here but there are many." Id.

The petitioner complained, without success, in the court of appeals and in the petition for writ of error to this Court that the trial court committed reversible error in admitting the affidavit in evidence and allowing it to be taken to the jury room during the jury's deliberations. Petitioner has not wavered in the belief that admission of the affidavit was erroneous and that this and other trial errors required reversal, but these points, though reurged, will not be argued further. This motion for rehearing is based on the fact that the admission of the affidavit in evidence amounts to denial of fundamental rights of due process and constitutional safeguards guaranteed by the Constitutions of the United States and the State of Texas.

Denial of Federal Due Process Requirements:
Lack of Notice of Charges

The primary requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objection. Searcy v. The State Bar of Texas, 604 S.W.2d 256, 260 (Tex. Civ.

App.--San Antonio 1980, writ ref'd n.r.e.). To this end, Texas State Bar Rule 18(5) provides that a disciplinary petition shall allege:

> (4) a brief description of the acts and conduct that gave rise to the claimed professional misconduct sufficient to give fair notice, which allegations may be grouped in one or more counts;
>
> (5) the disciplinary rule or rules allegedly violated by such acts and conduct or other grounds for seeking sanctions...

Failure to comply with this rule, e.g., by omitting to enumerate each rule relied on to support a disciplinary judgment, "creates a significant potential for lack of notice that, in a proper case, might require reversal." *Vander Voort v. State Bar of Texas*, 802 S.W.2d 332 (Tex. App. -- Houston [1st Dist.] 1990, writ denied).

> Disciplinary and disbarment actions are
>
> adversary proceedings of a quasi-criminal nature. Cf., In Re Gault, 387 U.S. 1, 33, 87 S. Ct. 1428, 1446, 18 L. Ed. 2d 527. The charge must be known before the proceedings commence. They become a trap when, after they are under way, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

In re Ruffalo, 390 U.S. 544, 551, 88 S. Ct. 1222, 1225 (1968). In Ruffalo, the Supreme Court held that an attorney in an Ohio State disbarment proceeding was denied procedural due process because of the lack of fair notice as

to the reach of the grievance procedure and the precise nature of the charges against him even though he was given several months to respond to an additional charge made after the proceeding commenced. In this case, admission of the Taylor affidavit injected new charges of "dishonesty, fraud, deceit, or misrepresentation" against Moore which far exceeded the reach of the State Bar's petition and the charges it contained, and Moore was given no opportunity to prepare for or respond to the additional charges.

The Supreme Court of the State of Arizona reversed the disciplinary action taken against an attorney in the case of Matter of Myers, 795 P.2d 201 (Ariz. 1990) for the same reason given in Ruffalo, holding an attorney "may not be charged with one violation and then, without opportunity for hearing or presentation of evidence, be disciplined for another." Id., p. 204-05. Citing Ruffalo for the proposition "that a lawyer has a right to procedural due process in state bar proceedings," the court said that

> [i]n effect, the dissent argues that respondent may be charged with specified offenses and, despite the lack of evidence to support those charges, be found to have committed others that were neither charged nor the subject of any hearing. We reject such a proposition as failing to comport with elemental due process.

The Louisiana Supreme Court reached the same result in Louisiana State Bar Ass'n v. McGovern, 481 So.2d 574 (La. 1986).

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. (Citations omitted.) Thus, he is accordingly entitled to procedural due process,

> which includes fair notice of the charge. (Citations omitted.) As stated in Randall v. Brigham, 7 Wall. (74 U.S.) 523, 540, 19 L. Ed. 285, 293 (1869), in proceedings for disbarment which are "not taken for matters occurring in open court, in the presence of judges, notice should be given to the attorney of the changes made and an opportunity afforded him for explanation and defense."

Id., p. 576. Because McGovern had no notice that certain acts or omissions would be considered disbarment offenses until after he had testified, the court, "in order to protect [him] from an unconstitutional deprivation of due process" refused to consider them. Id., p. 577. In the present case, however, the jury was allowed to consider the additional acts and omissions set out in the Taylor affidavit, and affidavits from jurors establish that the jury's decision was based on the affidavit.

Under the Ruffalo doctrine, a disciplinary agency cannot sanction a licensee because of evidence of misconduct that comes to light in the trial unless it has been fairly charged in the petition. Shields v. City of Shreveport, 579 So. 2d 961, 968 (La. 1991). Failure to give fair notice of allegations against a licensee prior to a disciplinary trial constitutes a denial of procedural due process. See Burdge v. State Board of Medical Examiners, 403 S.E.2d 114, 116-17 (S.c. 1991), holding that failure to give fair notice of allegations against the licensee constituted a denial of procedural due process. In Comm'n on Pro. Ethics and Conduct v. Wenger, 454 N.W.2d 367, 369 (Iowa 1990) the Iowa Supreme Court stated that

> allegations of professional misconduct portend severe penalties and thus carry with them

> 'substantial procedural due process protection' (citations omitted.) . . . In Ruffalo, the Court recognized that when charges are not lodged against an attorney until the disciplinary proceedings are underway and the respondent has testified, the process may be transformed from a search for the truth to a trap for the unwary. (Citations omitted.) In ordinary civil or criminal litigation, such a violation of procedural due process would 'never pass muster.' Ruffalo, 390 U.S. at 551, 88 S. Ct. at 1226, 20 L. Ed. 2d at 122. Because lawyer disciplinary actions are quasi-criminal in nature, the Court held, 'the charge must be known before the proceedings commence.' Id. at 551, 88 S. Ct. at 1226, 20 L. Ed. 2d at 122.

Due process "prohibits sanctioning the attorney for unrelated misconduct revealed by the evidence in the disciplinary proceeding when the attorney had not been notified that the uncharged violations would be considered as disciplinary offenses or that he should be prepared to present a defense as to that misconduct." Louisiana State Bar Ass'n v. Keys, 567 So. 2d 588, 591 (La. 1990) citing Louisiana State Bar Ass'n v. McGovern, supra.2 "[I]n order to protect the respondent from an unconstitutional deprivation of due process, only the violations included in the charges of the bar association's petition will be considered." Nebraska State Bar Ass'n v. Dineen, 455 N.W.2d 178, 946 (Neb. 1990) citing Louisiana State Bar Ass'n v. McGovern, supra. The record in this case establishes beyond question that the trial court admitted hearsay evidence of claims of "dishonesty, fraud, deceit, or misrepresentation" which were beyond the scope of the charges made by the State Bar, without opportunity for Moore to prepare for or defend against them.

Under the authorities cited above, this was a denial of federal constitutional due process and requires reversal.

In Plunkett v. Estelle, 709 F.2d 1004, 1009 (5th Cir. 1983), the Fifth Circuit Court of Appeals said that

> [n]o principle of procedural due process is more clearly established than notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, . . . are among the constitutional rights of every accused.

The court determined that due process was denied "where the [court's charge] read with the jury argument and the evidence at trial [were] such that a reasonable juror could have convicted Plunkett of a distinct crime with which he was not charged." Id. at 1010. Plunkett's "constitutional right [was] the Sixth Amendment right 'to be informed of the nature and cause of the accusation . . .'" Id. The Fifth Circuit held that the difference between defenses for different charges "obviously would effect (sic) the defensive preparation. It is basic notice which was denied. We cannot find that denial to have been harmless. The denial was unconstitutional and prejudiced the defendant." See also United States v. Fooladi, 746 F.2d 1027 (5th Cir. 1984); Cupp v. Naughten, 94 S. Ct. 396, 414 U.S. 139 (1973).

Likewise, the injection into evidence of the additional claims and charges contained in the Taylor affidavit denied basic notice and unconstitutionally prejudiced Moore. As in Plunkett, this prejudice must also be considered in the context of the entire trial, or, as Judge Higginbotham observed "in the courtroom scene with all the props and scenery that there existed." Id. at 1008.

Plunkett dealt with a situation (submission of an erroneous charge) where the burden of proving denial of due process is more onerous than the burden in this case, which requires only a showing that claims and charges beyond those in the State Bar pleadings were allowed in evidence; nevertheless the facts of this case satisfy the Plunkett test for reversal. A reasonable jury could have considered (and, in fact, did consider) the claims in the Taylor affidavit in arriving at the verdict against Moore. Under Plunkett, this requires reversal.

Denial of Federal Due Process Requirements: Opportunity to be Heard

The second fundamental requirement of due process is the opportunity to be heard. In addition to being denied adequate notice of the charges and claims contained in the Taylor affidavit, Moore was denied adequate opportunity to be heard on the claim contained in the disciplinary pleading.

The trial court granted the State Bar's motion in limine restricting introduction of evidence of repayment of monies to the Taylor aunts. Tr. 425. During trial, Moore's counsel objected to testimony concerning events after Dec. 1, 1983, on the ground that the State Bar had stated in answer to an interrogatory that it did not contend that any misrepresentations were made after that date. S.F. 165-69. The Court responded that it would sustain the objection and rule that transactions after Dec. 1, 1983, were not to be mentioned before the jury, but only on condition that Moore's counsel not tell the jury that there was no evidence that the Taylor aunts were damaged. S.F. 170-74. When this assurance was not forthcoming, the court overruled the objection, saying that the evidence would not be allowed to show a breach of professional responsibility, but would be allowed "to complete the transaction that is already before

the jury." S.F. 175-76. Subsequently, the court permitted evidence that Moore defaulted in payment of the loan, and that the C.D.'s were applied to the loan. S.F. 190-91.

Thereafter, Moore's counsel sought to introduce evidence of payments made by Moore on the indebtedness after default, which the court had ruled inadmissible in sustaining the State Bar's motion in limine. S.F. 460. The court ruled that "the motion in limine stands" and barred evidence of Moore's payments on the loan. Id. Later, the court sustained objection to a question to Moore by his counsel regarding whether, in June 1984, Mary and Blanche J. Taylor sent him a written proposal regarding supervision of his law firm and allocation of income the firm received to payment of the debt. S. F. 465-66. Moore took exception to the ruling in which he detailed his counteroffer and efforts to make arrangements to pay the amounts owing. The court ruled that the testimony was not material and would open up "other areas" regarding collection of the debt. S.F. 480-81.

Thus, after permitting the State Bar to introduce evidence of default, the court refused to allow evidence that Moore had made substantial repayments, that he had endeavored to make arrangements for payments suitable to the aunts, and that he had been forced into bankruptcy by the action of Taylor and his aunts. These rulings presented a false picture of Moore as having secured the loan without any intent to repay it, which gave unwarranted credence to the contention that the Taylor aunts had been fraudulently induced to pledge their C.D.'s for the loan. The prejudicial effect of these rulings was aggravated by argument of State Bar counsel, who, after prevailing on the court to admit evidence that Moore defaulted in payment of the note and preventing evidence of the cause for the default, payments made, and arrangements for repayment, told the jury, in argument, that Moore utilized the love and affection the

aunts had for their nephew, Mark Taylor, "to get what he wanted, which was to wipe out his debts and walk away." S.F. 2/23/90, p. 14.

The trial court recognized that it was the State Bar's burden to prove that Moore knowingly made false statements and intended that the aunts rely on them, thereby fraudulently inducing the Taylor aunts to collateralize the loans. Id., pp. 3-5. Nevertheless, the court prohibited Moore from introducing evidence which established that he had no intent to defraud, while allowing the State Bar to bolster its case improperly by arguing that Moore never intended to repay the loan, but intended only to get his debts paid "and walk away." Moore has thus been denied due process by being refused the "opportunity to be heard," i.e., to offer evidence of payments and efforts to repay the loan which was probative, admissible, and directly responsive to the claim of fraud, dishonesty, deceit, and misrepresentation.

The combined effect of the actions by the trial court, detailed in this motion and in the application for writ of error, were at least as prejudicial as those of the court in Bethany v. State, 814 S.W.2d 455 (Tex. App.--Houston [14th Dist.] 1991), and denied Moore his rights to a fair trial and the effective assistance of counsel.

Denial of State Due Process Requirements

The state constitution imposes the same requirements of notice and opportunity to be heard in this case as does the federal constitution. See House of Tobacco, Inc. v. Robert S. Calvert, 394 S.W.2d 654 (Tex. 1965); Denton v. City of Austin, 587 S.W.2d 56 (Tex. Civ. App.--Beaumont 1979, no writ).

> Both the U.S. Constitution, Amendment Fourteen, Sec. 1; and the Texas Constitution, Article 1, Sec. 19, provide that no person shall be deprived of life, liberty, or property without due process of law. Fundamental to the concept of due process is the right to be heard. Fuentes v. Chevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). The right to be heard assures a full hearing, the right to introduce evidence at a meaningful time and in a meaningful manner, and to have judicial findings based upon that evidence.

King v. Lindley, 697 S.W.2d 749, 752 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.).

The Texas Constitution contains two separate due process provisions. Article 1, Sec. 19 sets out the traditional due process guarantee that no one "shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." Article 1, Sec. 13 prohibits excessive bail, excessive fines, cruel or unusual punishment and guarantees that all courts shall be open and every person shall have remedy by due course of law for an injury done him in his lands, goods, person, or reputation. See Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983). The federal constitution "sets the floor for individual rights; state constitutions establish the ceiling." LaCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986). The Texas Supreme Court has been in the mainstream of the movement to look to the state constitution to protect individual rights. Id.

For the reasons set out in the preceding sections of this motion, it is clear that Moore has been denied due process rights guaranteed by the Texas Constitution, which requires that this case be reversed.

Summary and Conclusion

The trial court allowed additional "charges" in the form of that Taylor affidavit, to be leveled against Moore after trial commenced while refusing to allow him to be heard on those charges or on the State Bar's claim that Moore acted fraudulently by securing the loans and "walking away." The damaging statements contained in the affidavit were wholly unrelated to the limited portions of the affidavit read for the purposes of impeachment of Taylor. Moore had no opportunity to prepare to defend or defend against the charges, since their improper admission could not have been foreseen. Admission of the affidavit was obviously highly prejudicial, as is evidenced by jurors' affidavits obtained after the trial, which indicate that the affidavit was read during the jury's deliberations and played a major part in the jury's determination. Clearly, Mr. Moore has been denied due process, and this case should be reversed.

For the reasons set forth above, it is respectfully requested that this motion for rehearing be granted and that, upon rehearing, the case be reversed and remanded for new trial.

Respectfully submitted,

/s/ illegible
JACK N. PRICE
State Bar No. 16293000
410 Congress Avenue
Second Floor
Austin, Texas 78701
512/474-1563
FAX # 512/474-4727

ATTORNEY FOR PETITIONER

Certificate of Service

I hereby CERTIFY that a true and correct copy of the above and foregoing instrument has been mailed, via **CERTIFIED MAIL, RETURN RECEIPT REQUESTED**, to Ms. Linda A. Acevedo, Office of the Attorney General, P. O. Box 12487, Capitol Station, Austin, Texas 78711, on this the 6th day of April, 1992.

/s/ illegible
Jack N. Price